

BECCLE

BERGEN CENTER FOR COMPETITION LAW AND ECONOMICS

# Regulating Unfair Trading Practices in Competition Law

Reykjavik 01.02.2018

[www.beccle.no](http://www.beccle.no)  
[post@beccle.uib.no](mailto:post@beccle.uib.no)

UNIVERSITY OF BERGEN



NHH



# Introduction

1. Background
2. Presentation of the regulatory landscape in Europe and Norway
3. The Commission's proposal for a UTP Directive
4. UTP regulations and Competition Law

# Background

- Report about the possibility to regulate anti-competitive “unilateral” practices outside the prohibition of abuse of dominance
  - Co authored with Ignacio Herrera Anchustegui
  - We recommended not to establish a legal basis for intervening with unilateral practices
    - Most practices are not unilateral
    - Most practices do not have an anti-competitive effect
- Review of the Commission’s proposal for a UTP Directive in the food supply chain
  - CoRe 2018 pp. 280-289
    - Co authored with Ignacio Herrera Anchustegui
- The Scope for National Regulation of Unfair Trading Practices
  - Coming in “Festskrift for juridik fakultets 50 års jubileum”
    - Co authored with Ignacio Herrera Anchustegui

# Unfair Trading Practices

- Practices that deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another
- Often the result of someone taking advantage of their buyer power vis-à-vis a weaker party
- Can be welfare enhancing if effective competition downstream
- Transfer of profits or risks between the parties to a commercial relationship
- Examples:
  - Exclusive supply
  - Refusal to buy and delisting
  - Joint marketing contributions
  - Unilateral contract amendments

# Regulative landscape in Europe

- Different regimes in different Member States
  - No specific regulation
    - Norway, Denmark and Sweden
  - Special provisions in national competition law
    - Lower threshold for finding dominant position (sector specific)
      - Finland, Lithuania
    - Prohibition of abuse of relative dominance or economic dependence
      - Germany, France, Italy....
  - Unfair competition law
    - Germany, Spain
  - Sectoral regulations of the food supply chain

# Regulative landscape in Norway

- A general good faith standard applicable to relationship between competitors
- Proposed act on good faith/unfair competition in the food supply chain
  - Report from 2012.
  - Parliament has requested that the Government shall propose this act in the Parliament
  - The proposal contains
    - a *good faith standard*
    - Requirements of written agreements which shall clearly and completely identify each party's rights and obligation
      - Including deadlines for delisting
- Report from 2017 about the possibility to regulate anti-competitive “unilateral” practices outside the prohibition of abuse of dominance
- There has been claims for prohibiting discriminatory pricing
- Lots of resources spent (wasted?) on reports about competition in the food supply chain/sector

# EU Commission's proposal for UTP Directive

- The proposal regulates certain practices/contract clauses in the relationship between producer-supplier and supplier – supermarkets in the food supply chain.
- The purpose is to protect small producers (in particular farmers)
- The proposal prohibits certain conducts
- It establishes requirements of form and clarity for some specific type of clauses
- It establishes national public enforcement
  - Including a competence to impose fines
- It is limited to the food supply chain
  - Only where one party is an SME (EU-Parliament proposes to change this)

# The proposal's substantive rules

- Article 3(1) prohibits
  - Late payment (after 30 days) for perishable food products
  - Cancelling orders for perishable food products at short notice
  - Unilateral and retroactive amendments of the terms of an agreement concerning frequency, timing or volume of supply and delivery
  - Placing an obligation on the supplier to pay for wastage of food products on the buyer's premises and that is not caused by the supplier's negligence or fault.
- The proposal protects 'weak' parts from having to accept contractual terms allowing for these practices
  - Combined with public enforcement this may be an effective protection

# The proposal's substantive rules

- Article 3(2) bans certain practices unless they are agreed in «clear and unambiguous terms»
  - return of unsold food products
  - charging a supplier payment as a condition for stocking, displaying or listing food products
  - supplier's payment for the promotion and marketing of food products sold by the buyer
    - Additional requirements of specifying costs related to promotions
- Essentially introducing mandatory contractual terms between buyers and suppliers
- Contributes to awareness about distribution of risk and cost
  - While allowing for different solutions on how to distribute risks and costs.
  - Allows for efficient contracts
- May increase end consumer price

# What the directive does not regulate

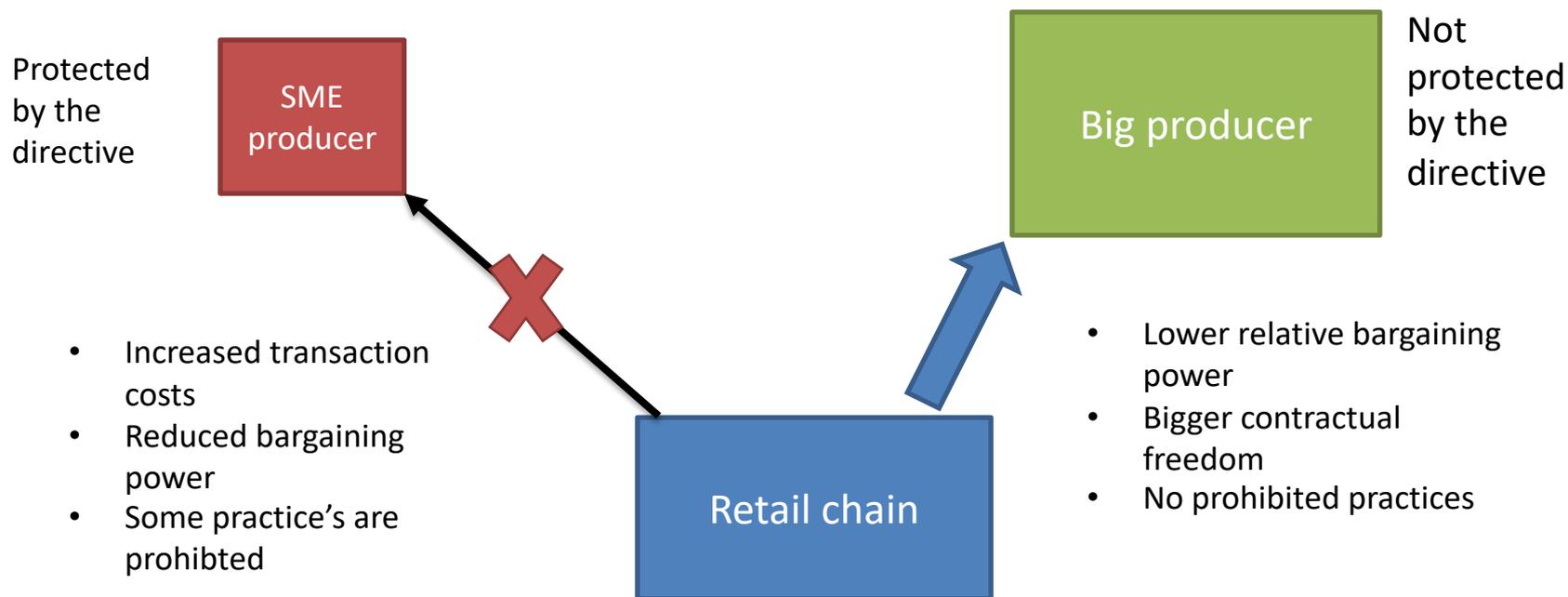
- Refusal to buy or refusal to deal
- Delisting
- Prices below cost
  
- Prohibiting refusal to deal and (legal) delisting would be inefficient,
  - and go to far in interfering with private economic freedom and contractual choice.
- Prices below cost is difficult to enforce and may prevent efficient bargaining

# The proposal's enforcement regime

- The substantive rules in Article 3 shall be subject to public enforcement
- Article 5: Suppliers may complain to a public agency
  - Right to remain anonymous
  - Supposed to be an easier way of complaining than suing before the courts
- Article 6: Public enforcer shall be given the right to
  - Conduct investigations based on complaints or ex officio
  - Impose infringement decisions and require the conduct to end
  - Impose fines

# Comments

- Possible side effect: Powerful buyers choose to deal with larger producers instead of SMEs
  - May also lead to entry barriers if SME producers/suppliers are unattractive business partners
  - These effects are not discussed in the proposal



# Comments

- Trade off between possibly higher prices and protection of SME-suppliers
  - Increased costs passed on to end consumers
- The proposal does not prevent efficient use of bargaining power
  - But Member States may choose higher level of protection
  - Member States may also choose to make the rules applicable outside of the food supply chain
    - We recommend caution here – the structure of the food supply chain is characterized by small suppliers
- Choice of enforcement agency in Member States
  - Competition agency will enforce them from an economic efficiency perspective – may lead to under enforcement
  - Agricultural regulators may be too protective? – over enforcement?

# Proposed changes by the Agricultural committee in the Parliament

- Expand applicability to all suppliers, not only SME?
- Adds several practices to the prohibition
  - Unilateral termination of agreement
  - Usage of threats of destocking to gain advantages
    - Threats of commercial retaliations
  - Imposing imbalance of rights and obligations
  - Imposing of listing fees
  - And many more....
- Proposes a new article 3a which includes requirements of form (written) and content of the agreements (price, quantity, duration etc. )

# UTP regulations and EU Competition Law

- Regulation 1/2003 Article 3 (2)
  - Restricts enforcement of agreements and concerted practices in national competition law
    - Agreements which do not violate art 101 cannot be prohibited in national competition law
  - Member States are free to enforce unilateral conduct
- Regulation 1/2003 Article 3(3)
  - Limits the scope of Article 3(2) by stating that art 3(2) does not restrict the application of national law that predominantly pursues an objective different from that of Art 101 and 102

# UTP regulations and EU Competition Law

- Member States are free to regulate UTPs outside of Competition Law
  - How do we decide if a national regulation is competition law?
    - By its purpose/goal according to art 3(3)
- Purely unfair competition acts should go clear of art 3(2)?
  - The distinction between fair competition and efficient competition is not always clear
- How about provisions in competition acts regulating UTPs?
  - Often enforced with focus on efficiency?
  - Will they be distinct enough to not be considered as national competition law?

# UTP regulations and EU Competition Law

- **What's the problem?** UTPs are unilateral conduct anyway and Art 3(2) of reg 1/2003 does not restrict national law?!?!
- The distinction in art 3(2) does not correspond to the difference between art 101 and 102
- Provisions regulating UTPs may prohibit agreements which don't violate art 101
  - For example: Finnish comp law possibly prohibiting exclusivity agreements which don't necessarily violate art 101
  - For example: French or German provision (in their competition acts) prohibiting abuse of relative market power may also prohibit certain agreements
    - Depends on the application of these provisions
    - If applied with the same concept of restriction of competition there is no problem

# UTP regulations and EU Competition Law

- Provisions regulating UTPs often regulate or prohibit unilaterally imposed clauses in agreements
- So even though unilaterally imposed, there is an agreement
  - Which don't necessarily violates art 101
    - Or is exempted through the block exemption
- Tempting to classify these both as a unilateral conduct and an agreement, but is that possible?
- If these examples are considered as agreements, do many national acts regulating UTPs violate Art 3(2) of reg. 1/2003?

# UTP regulations and EU Competition Law

- What is unilateral conduct in relation to art 3(2) of regulation 1/2003?
  - No definition of unilateral conduct in EU law
  - A narrow interpretation on unilateral conduct implies that there exists many national provisions violating reg 1/2003
    - Is that in itself an argument for a wide interpretation of unilateral conduct?
  - The Commission doesn't interfere with existing national law
  - Art 3 of reg 1/2003 was adjusted in the legislation procedure precisely to avoid EU competition law interfering with national regulations of what is perceived as “unilateral” conduct
- On this basis we argue for a wide interpretation of unilateral conduct on Art 3(2) of Reg. 1/2003

# Conclusions

- Regulating unilaterally imposed contract terms in national law probably goes clear of art 3(2) of Reg. 1/2003
- Member States are still “safer” if they regulate UTPs in legal instruments which clearly falls outside of national competition law